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# The European Human Rights Convention: Time for a Radical Overhaul?

by *Andrew Drzemczewski\**

## I. INTRODUCTION

Rather than provide a comprehensive analysis of the European Human Rights Convention's<sup>1</sup> effectiveness, this Article provides an overview of the machinery set up thereunder and a short explanation of its uniqueness, followed by an overview of what has already been achieved in the Member States of the Council of Europe as a direct result of case law in Strasbourg. This will lead to an explanation as to why some observers believe that the machinery created under the Convention may have become a victim of its own success and in need of a radical overhaul. Over the years, a variety of proposals to change fundamentally the present Strasbourg human rights machinery have been put forth.<sup>2</sup> A recent Swiss initiative, discussed at a conference organized by the University of Neuchâtel in March 1986, has received substantial support from many academics and practitioners and most certainly merits further consideration.<sup>3</sup> This initiative is likely to form the basis of serious discussions to be held under the auspices of the Council of Europe in the coming years, although it is still too early to speculate as to the chances of its success.

## II. AN OVERVIEW

Drawn up within the Council of Europe, the Convention was signed on November 4, 1950 and came into force on September 3, 1953. This international instrument represents a collective guarantee at a European level of a number of principles set out in the 1948 U.N. Universal Declaration of Human Rights, supported by international judicial and quasi-judicial machinery making deci-

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<sup>1</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *The European Convention of Human Rights*].

<sup>2</sup> See e.g., A. DRZEMCZEWSKI, *EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY* 330-41 (1983).

<sup>3</sup> The proceedings of this conference will be published in a forthcoming issue of *THE HUMAN RIGHTS LAW JOURNAL*.

sions which must be respected by the 21 contracting state parties. This international regional guarantee mechanism is not a substitute for national machinery which ensures the protection of human rights, but is a supplement to it. In fact, proceedings before the Convention institutions cannot be commenced until all domestic remedies have been exhausted.

These institutions are the European Commission, and the Court of Human Rights, which have their seat in Strasbourg, France. Furthermore, the Committee of Ministers of the Council of Europe is called upon to act in cases which are not brought before the Court.

The Commission may receive petitions from a contracting party alleging violations of rights and freedoms set forth in the Convention by another contracting state. In addition, any person, group of individuals or non-governmental organization may also address petitions to the Commission against the contracting party within whose jurisdiction he or they fall, so long as that contracting party has recognized, by express declaration, the competence of the Commission to receive such petitions.

The Commission's principal task is that of inquiry and conciliation. If no friendly settlement is reached on the basis of respect of human rights, the Commission formulates a legal opinion and, as regards the subsequent procedure, the Commission has the right, together with the States concerned, of referring the case to the European Court.

The Court, for its part, is competent to take a judicial decision which is binding on the parties to the proceedings, on whether in a given case the Convention has been violated by a contracting state. If the Court is not seized of the case, it is for the Committee of Ministers to decide on the question of whether the Convention has been breached.<sup>4</sup>

### III. THE CONVENTION'S UNIQUENESS

The European Human Rights Convention, although constructed upon tenets of traditional treaty law, differs from other international agreements in a number of fundamental respects. First, the concept of nationality is considered irrelevant. Article 1 of the Convention stipulates that the contracting parties "shall secure to everyone" (*à toute personne*) within their jurisdiction the substantive rights and freedoms enumerated therein. Thus, whether an individual is stateless, an alien, a refugee, or a national of a particular state, is of no concern to the Convention organs. Second, the concept of reciprocity is inapplicable in terms of traditional contractual, synallagmatic agreements. In the first interstate case to come before the European Court of Human Rights, *Ireland v. U.K.*,<sup>5</sup> in

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<sup>4</sup> See Appendix I.

<sup>5</sup> *Ireland v. The United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).

which the United Kingdom was found to be in breach of Article 3 of the Convention, a nonderogable provision, the Court had the opportunity to explain this point in no uncertain terms: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which in the words of the preamble, benefit from a 'collective enforcement.'"<sup>6</sup> In addition, and on a related point, the rights and freedoms guaranteed in the Convention are considered already to exist and be well protected in the 21 Member States' legal systems. In other words, the novelty of the Convention was not so much its content, that is the list of human rights provided therein, but rather the optional right of individual petition before the European Commission of Human Rights permitting for an eventual objective, outside verification as to whether in reality the said rights are effectively guaranteed domestically. Simply put, the institution of such a procedure, together with the possibility of a final determination by the European Court of Human Rights, is an achievement of major legal and political importance both in terms of historical precedent and comparative contemporary institutional analysis.<sup>7</sup>

#### IV. THE CONVENTION'S ACHIEVEMENTS

The Convention's achievements have been quite staggering, though unfortunately sometimes still confused with the institutions of the European Communities.<sup>8</sup> In Austria, where the Convention has the rank of constitutional law, the code of criminal procedure has had to be modified as a result of case law in Strasbourg. The system of legal aid fees for lawyers has also been changed. In Belgium the penal code, vagrancy legislation, and civil code have been amended to ensure equal rights to legitimate and illegitimate children. More recently, a law concerning the public conduct of disciplinary proceedings before appeals boards of the orders of physicians and pharmacists has been adopted.

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<sup>6</sup> *Id.* at 90-91, para. 239. Such international developments may have substantial domestic constitutional repercussions. With respect to the issue of reciprocity expressly referred to in Article 55 of the French Constitution of 1958, see e.g., *Droit international et droit français*, Etude du Conseil d'Etat, 4803 *La Documentation Française. Notes et études documentaires*, 18 (1986).

<sup>7</sup> Although it can be argued that the Inter-American system has the potential to surpass achievements in Strasbourg (insofar as the American Convention on Human Rights is concerned), one must, unfortunately, bear in mind "that the substantive jurisprudence of the Commission and Inter-American Court of Human Rights fades in the light of reality of the gross violations with which they are faced." Hannum, Book Review, 80 *AM. J. INT'L L.* 261 (1986) (reviewing *HUMAN RIGHTS IN INTERNATIONAL LAW* (T. Meron ed. 1984)).

It is still far too early to comment on the only other existing regional Human Rights mechanism, namely the O.A.U. African Charter of Human and Peoples' Rights, which recently came into force on October 21, 1986.

<sup>8</sup> The European Parliament also holds its sessions in Strasbourg.

In the Federal Republic of Germany, modifications have been made to the code of criminal procedure concerning pretrial detention, various measures have been taken to expedite criminal and civil proceedings, and transsexuals have been legally recognized.

In the Netherlands, where some of the Convention's provisions are endowed with a hierarchically superior status to the Constitution itself, changes have been made in the military criminal code and the law on detention of mental patients. In Ireland, subsequent to the *Airey* case,<sup>9</sup> court proceedings were simplified and civil legal aid and advice schemes set up. Sweden has introduced rules concerning time limits for expropriation permits, and legislation is planned concerning the regulation of building permits. Switzerland has amended its military penal code and has reviewed completely its judicial organization and criminal procedure as applied to the federal army. In addition, Switzerland has also amended its civil code regarding deprivation of liberty in reformatory centers. That is not all. Well over a hundred other instances can be cited where settlements have been reached either formally or informally, often with the Commission's or the Court's approval, subsequent to concessionary measures taken by the governments concerned.

And what about the United Kingdom? Despite the fact that the Convention has not been incorporated into domestic law, as is also the case in Ireland, the Scandinavian countries, Iceland and Malta, its constitutional impact cannot be doubted: witness the overruling of a unanimous House of Lords decision by the European Court in the famous *Sunday Times*<sup>10</sup> case or recent legislation enacted subsequent to the *Malone* telephone tapping case.<sup>11</sup> Numerous other examples can be provided, such as the substantial changes in prison rules, a complete redrafting of mental health legislation, compensation for administrative miscarriages of justice, changes of interrogation techniques used on detainees, and the repeal of legislation prohibiting homosexual relations between male consenting adults in Northern Ireland.<sup>12</sup>

#### V. VICTIM OF ITS OWN SUCCESS?

With such achievements behind the European Human Rights Convention Machinery, why even contemplate, let alone attempt to implement, any signifi-

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<sup>9</sup> 32 Eur. Ct. H.R. (ser. A) (1979).

<sup>10</sup> 30 Eur. Ct. H.R. (ser. A) (1979).

<sup>11</sup> 82 Eur. Ct. H.R. (ser. A) (1984).

<sup>12</sup> For a thorough overview of Strasbourg case law, consult P. VAN DIJK & G. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1984) and the forthcoming book by the Commission's former President, J. FAWCETT, *APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d. ed. 1987).

See also, Council of Europe, *Collection of Resolutions Adopted by the Committee of Ministers in Application of Articles 32 and 54 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1959-1983* (1984), and the First Supplement thereto, covering the years 1984-1985 (1986).

cant changes in the present framework? Quite simply, because there are indications that the present functioning of the Convention organs may be reaching breaking-point, both in terms of volume of work and related unacceptable delays in proceedings. Between 1958 and 1972 the European Court delivered on average one judgment a year. The average between 1981 and 1985 was eleven. In 1986 the Court rendered sixteen judgments. The European Commission of Human Rights, the filtering body, which holds five or six two-week sessions a year, with a secretariat consisting of less than 30 lawyers and some 15 support staff, deals with nearly 600 applications per year, many of which are of a diverse and highly complex nature. In the nationalization case, *Lithgow v. U.K.*,<sup>13</sup> hearings before the Commission had to be held in the courtroom as the Commission's own deliberation room was inadequate and incapable of accommodating over 20 lawyers representing the parties, the 21 Commissioners, their staff and interpreters. The proposed construction of a new *Palais des Droits de l'Homme* will probably not solve the problem.<sup>14</sup> Many, many more difficult problems are still unsolved. The part-time members of both organs and their respective staff are severely overworked. Even the Commission's president has indicated that a serious backlog of business is building up which he fears may escape the Commission's control. Members of the Court have expressed similar anxiety, both concerning their workload and inadequate working conditions.

Another closely related problem is that of delay. Although it takes an average of about six years for a case to be decided in Strasbourg, in some instances nine or ten years have elapsed before a case is resolved. Add to this the fact that France, Portugal, Spain and more recently Greece have now accepted the right of individual petition; tinkering with relatively minor procedural techniques in order to expedite and simplify proceedings may be insufficient.

## VI. MOVES FOR CHANGE

These problems make it easy to comprehend the Swiss Government's initiative at the first European Ministerial Human Rights Conference in March, 1985 to propose a radical overhaul of the whole structure: do away with the Commission, whose work to a great extent overlaps with that of the Court; give an individual the right to take his case directly before the European Court of Human Rights,<sup>15</sup> and eradicate the anomalous situation in which the Committee of Ministers, the executive political body of the Council of Europe representing the Member States, acts as an alternative decision-making body, now that all states, with the exception of Malta and Turkey, have accepted the Court's compulsory jurisdic-

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<sup>13</sup> 104 Eur. Ct. H.R. (ser. A) (1986).

<sup>14</sup> See Council of Europe, Human Rights. Information Sheet No. 19, Doc. H/INF(86)1, 22, Appendix III (1986).

<sup>15</sup> As explained previously, only the Commission and State Parties concerned may refer a case to the European Court of Human Rights.

tion.<sup>16</sup> The Swiss government considers the present length of proceedings in Strasbourg as manifestly excessive. It asks how it can take the Strasbourg organs three years and ten months to find that domestic proceedings lasting three and a half years have exceeded a reasonable time as prescribed by Article 6 of the Convention.<sup>17</sup>

The right of individual petition, now accepted by 18 states, has fundamentally altered entrenched constitutional principles in many countries. The Convention in effect already provides for judicial review of sovereign legislative action when such legislation purportedly impinges on fundamental human rights guaranteed by the Convention. Thus, a streamlining of the present framework should not in itself alter the Convention's application.

## VII. CONCLUSION

What the Swiss government proposes, what the European Commission of Human Rights itself supports and what government representatives, judges and lawyers discussed at Neuchâtel in March 1986 was the possible merger of the European Commission and Court into a single full time European Court of Human Rights directly accessible to the individual, assisted by advocates-general. An idea which, ironically enough, comes close to what was proposed at the Hague Congress of Europe in 1948: the creation of a Court of Justice with adequate sanctions in order to implement a European Charter of Human Rights. In other words, a European Constitutional Court.

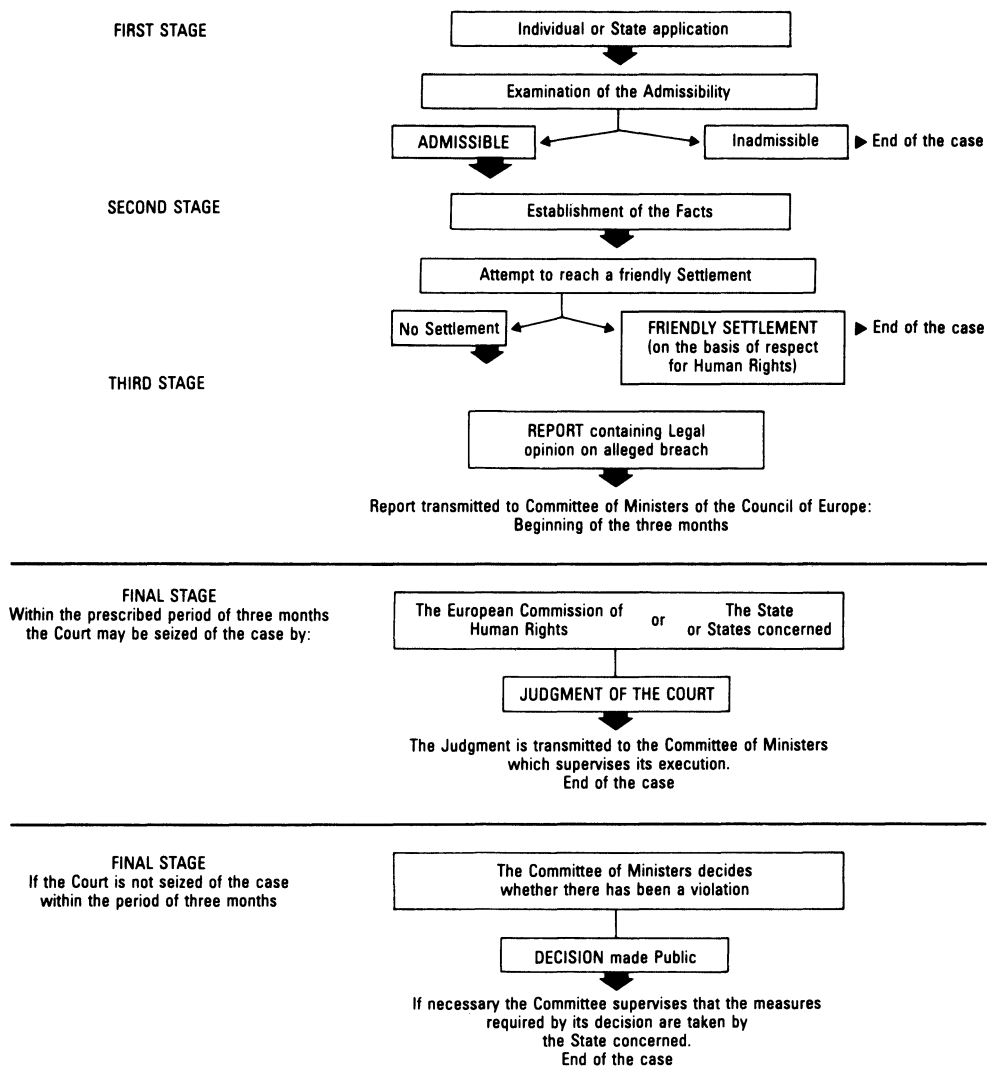
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<sup>16</sup> See *supra* note 3. See also, the comments of Prof. R. Higgins, Proceedings of the 77th Annual Meeting of the American Society of International Law, 396-97 (1983); see also, the forthcoming article of Hondius, *The Other Forum* (to be published in *MÉLANGES GERARD J. WIARDA*).

<sup>17</sup> See Council of Europe Doc. MDH(85)1.

### Appendix I

#### SCHEMA OF THE IMPLEMENTATION MACHINERY OF THE CONVENTION



*Note:* The right of individual petition (Article 25 of the Convention) and the Court's compulsory jurisdiction (Article 46 of the Convention) are optional.